



DEPARTMENT OF JUSTICE

VIGOROUSLY ENFORCING THE ANTITRUST LAWS: DEVELOPMENTS AT THE DIVISION

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Good afternoon. The last time I spoke at the Chamber of Commerce, I was only one month into my tenure as the Assistant Attorney General for Antitrust.¹ More than two years have passed, and the time is ripe to examine whether the Antitrust Division has been steadfast in ensuring vigorous enforcement of the antitrust law, as I promised upon confirmation. You be the judge, but I think I have fulfilled my promise and more.

To help you evaluate our achievements, I want to talk about developments at the Division on a variety of fronts—including civil merger and non-merger enforcement, international efforts, and competition advocacy work.

Transparency, certainty, and fairness in the enforcement of the antitrust laws have remained among my highest priorities as Assistant Attorney General. The Division has sought to meet those goals in a variety of ways, including by explaining the rationale underlying enforcement decisions in Competitive Impact Statements, press releases, and speeches and by updating Division guidelines and policies to ensure they remain current. Most recently, we released an updated Division Policy Guide to Merger Remedies.² All of these materials are made available on the Division's website.³ In all of these endeavors, the Division has remained fully committed to supporting a competitive marketplace that allows American businesses to compete on a level field.

I. Merger Enforcement

The Division has continued to devote significant resources to merger enforcement. Already this Fiscal Year, the Division has received more than 950 Hart-Scott-Rodino

¹ Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era* (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.pdf>.

² The updated Antitrust Division's *Policy Guide to Merger Remedies* was issued on June 17, 2011 and is available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

³ <http://www.justice.gov/atr/>

merger filings. With this volume at this point in the year, it appears that we are on track for an increase from Fiscal Year 2010 when we received 1,170 merger filings for the entire year and Fiscal Year 2009 when filings totaled 716. We also have been made aware of some potentially problematic non-reportable transactions, which adds to this merger review total.

When a merger is before the Division, our job is to evaluate whether the proposed consolidation will result in competitive harm. The specific Clayton Act standard of review is whether the “effect of [an] acquisition may be substantially to lessen competition, or to tend to create a monopoly.”⁴

Why and how we did or did not challenge a merger or allow conduct is important for the business community to understand. When clearly articulated, those details provide businesses with a measure of whether a proposed transaction will run afoul of the antitrust laws or be permitted to proceed without a challenge by the antitrust agencies. When companies negotiate transactions and evaluate would-be bidders that measure and the certainty it provides are important to all involved.

For more than 40 years the Department’s *Horizontal Merger Guidelines* have provided that articulation by explaining, in a publicly available document, the antitrust agencies’ analytical techniques, practices, and enforcement policies with respect to mergers of actual or potential competitors (*i.e.*, horizontal mergers).⁵ After a careful and efficient process of review, we, along with the FTC, updated the agencies’ guidance one

⁴ 15 U.S.C. §18.

⁵ The revised Horizontal Merger Guidelines were issued on August 19, 2010 and are available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

year ago to reflect our current approach to merger review.⁶ This is just one of the ways the Department of Justice has improved business insight into the antitrust rules of the road.

As I mentioned before, throughout my tenure as AAG, I have pledged to engage in vigorous enforcement of the antitrust laws. On the merger front, this vigorous enforcement includes efficient and effective determination of whether a proposed transaction raises competitive concerns. If a merger does not raise competitive concerns, the Division will let the parties know in the timeliest manner possible so they can proceed with closing the transaction. That was our approach in Microsoft/Yahoo,⁷ Southwest/AirTran,⁸ and Caterpillar/Bucyrus to name a few. There are many other merger reviews, which have not been disclosed publicly by the parties and, therefore, remain confidential, in which the Division was able to quickly evaluate the transactions' potential competitive effects in the first 30 days of review and determine that no further action was warranted at that time—thereby allowing the transaction to clear the Division's merger review process and business to proceed without unnecessary delay.

Of course, there are cases in which the Division determined that the transaction would lead to competitive harm. After a thorough investigation, we identified our competitive concerns, and if the parties agreed to an effective resolution, we filed a

⁶ *Id.*

⁷ See U.S. Dep't of Justice, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.* (Feb. 18, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

⁸ See U.S. Dep't of Justice, *Statement of The Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of AirTran* (Apr. 26, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270293.htm.

consent decree that remedied the competitive harm and allowed the parties to proceed with the remaining parts of their transaction that did not threaten competition. Recent consent decrees exemplifying this approach include Alberto-Culver/Unilever,⁹ Portec Rail Products/LB Foster Co.,¹⁰ MedServe Inc./Stericycle,¹¹ Election Systems & Software,¹² and Baker Hughes/BJ Services,¹³ and Bemis/Rio Tinto.¹⁴ These published consent decrees, like our policy guides, also provide details to help the business community understand and anticipate the Division's enforcement approach.

Bemis/Rio Tinto highlights another important point—the antitrust laws do not have a *de minimis* rule and even small portions of larger transactions may raise competitive concerns. Bemis's proposed acquisition of the Alcan Packaging Food Americas business from Rio Tinto would have combined two of the leading U.S. manufacturers of flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat.¹⁵ This

⁹ Proposed Final Judgment, *United States v. Unilever et al.* (D.D.C. 2011) (No. 1:11-cv-00858) (filed May 6, 2011), available at <http://www.justice.gov/atr/cases/unilever.html>.

¹⁰ Final Judgment, *United States v. L.B. Foster Company et al.* (D.D.C. 2011) (No. 1:10-cv-02115) (filed May 2, 2011), available at <http://www.justice.gov/atr/cases/f270500/270581.htm>.

¹¹ Final Judgment, *United States and Plaintiff States v. Stericycle, Inc. et al.* (D.D.C. 2009) (No. 1:09-cv-02268) (filed Apr. 29, 2010), available at <http://www.justice.gov/atr/cases/f258300/258349.htm>.

¹² Final Judgment, *United States and Plaintiff States v. Election Systems & Software, Inc. et al.* (D.D.C. 2010) (No. 1:10-cv-00380) (filed June 20, 2010), available at <http://www.justice.gov/atr/cases/f260100/260183.htm>.

¹³ Proposed Final Judgment, *United States v. Baker Hughes Inc. et al.* (D.D.C. 2010) (No. 1:10-cv-00659) (filed July 23, 2010), available at <http://www.justice.gov/atr/cases/f260800/260800.htm>.

¹⁴ Final Judgment, *U.S. v. Bemis Company, Inc., et al.* (D.D.C. 2010) (No. 1:10-cv-00295) (filed July 13, 2010), available at <http://www.justice.gov/atr/cases/f260600/260625.htm>.

¹⁵ Competitive Impact Statement at 4, *United States v. Bemis Company, Inc., et al.* (D.D.C. 2010) (No. 1:10-cv-00295) (filed Feb. 24, 2010), available at <http://www.justice.gov/atr/cases/f260600/260625.htm>.

aspect of the combination represented only a small portion of the overall transaction, which was valued at \$1.2 billion, but would have eliminated the significant competition between Bemis and Alcan.¹⁶ The Division's settlement preserved competition by requiring the divestiture of the entire business that produced the relevant product, which included all of the relevant intangible and non-plant tangible assets, as well as two of the four plants producing the relevant products.¹⁷

Not every merger enforcement action results in a consent decree. There have been cases, including some recent ones, where the parties have been unwilling to resolve the anticompetitive aspects of their transactions. When that happens, we are committed to going to court to block the transaction. We currently have two merger challenges underway, including our challenge to H&R Block/Tax Act,¹⁸ and Verifone/Hypercom.¹⁹ We recently settled a third, Tyson/George's.²⁰ In other instances—such as API Healthcare Corporation's proposed merger with Kronos Inc.,²¹ Blue Cross Blue Shield of Michigan's attempt to purchase Physicians Health Plan of Mid-Michigan (PHP),²² and

¹⁶ See *id.* at 1.

¹⁷ *Id.* at 15.

¹⁸ Complaint, *United States v. H&R Block, Inc., et al.* (D.D.C. 2011) (No. 1:11-cv-00948) (filed May 23, 2011), available at <http://www.justice.gov/atr/cases/f271500/271579.htm>.

¹⁹ Complaint, *United States v. VeriFone Systems Inc., et al.* (D.D.C. 2011) (No. 1:11-cv-00887) (filed May 12, 2011), available at <http://www.justice.gov/atr/cases/f271100/271115.htm>.

²⁰ Complaint, *United States v. George's Foods, LLC et al.* (D. Va. 2011) (No. 5:11-cv-00043-gec) (filed May 10, 2011), available at <http://www.justice.gov/atr/cases/f270900/270983.pdf>.

²¹ See Dep't of Justice, *API Healthcare Corp. Abandons Merger Plans with Kronos Inc. After Justice Department Expresses Antitrust Concerns* (Apr. 29, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270526.htm.

²² See U.S. Dep't of Justice, *Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans* (March 8, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/256259.htm.

most recently, the proposed NASDAQ/ICE acquisition of the NYSE, —the parties abandoned their transaction when faced with a Division challenge.²³

II. Consent Decrees in Vertical Cases

The merger enforcement cases I just described involved horizontal mergers or acquisitions of competitors. However, in my early speech here at the Chamber, I also expressed my hope and expectation that the Division would have the opportunity to examine complex combinations involving vertical theories—that is, transactions in which the businesses seeking to merge were situated above and below each other in the supply chain.²⁴ It should come as no surprise to the business community that we have had that opportunity. In an increasingly global and interconnected environment, business is frequently looking for strategic acquisitions that offer the synergies and efficiencies presented by combining various levels of production. Based on what we are seeing at the Division, business is finding those prospects.

In the past two and half years, the Division has reviewed a number of important vertical transactions (some of which also had horizontal aspects) including Live Nation/Ticketmaster,²⁵ NBC/Comcast,²⁶ Google/ITA,²⁷ and GraftTech/Seadrift Coke.²⁸

²³ See U.S. Dep't of Justice, *Nasdaq OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition of NYSE Euronext After Justice Department Threatens Lawsuit* (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

²⁴ Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, Address Before the U.S. Chamber of Commerce (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.pdf>.

²⁵ See U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254540.pdf.

²⁶ See U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 8, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/266149.htm.

²⁷ See U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc.* (Apr. 8, 2011), available at

Here again, the Division reviewed the transactions in light of their specific facts and market conditions and evaluated the competitive harms. In each case, we concluded that the transactions, as proposed, would give rise to competitive harm, and while we were prepared to sue, the parties agreed to consent decrees that addressed our concerns. These decrees included a variety of requirements—including licensing and firewall provisions, reporting obligations, and the creation of complaint mechanisms, to name a few. These types of decrees are commonly referred to as “behavioral” or “conduct” remedies. More important than the nomenclature is that with every settlement, our competitive concerns were addressed without limiting the efficiencies of the proposed transaction.

The NBCU/Comcast settlement is a good example. As originally proposed, the joint venture between NBCU and Comcast would have allowed Comcast, the largest cable company in the United States, to limit competition by either withholding or raising the price of NBCU content and effectively stifling new competition in the online video market.²⁹ Hearing our concerns and the facts that supported a complaint, the parties agreed to a consent decree that included a variety of conduct provisions that preserve existing and potential competition in the nascent online video market but without regulating how the market should work.³⁰

http://www.justice.gov/atr/public/press_releases/2011/269589.htm.

²⁸ See U.S. Dep’t of Justice, *Justice Department Requires GrafTech International to Make Key Changes to Supply Contracts in Order to Proceed with its Acquisition of Seadrift LP* (Nov. 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/264566.htm.

²⁹ Competitive Impact Statement at 22-23, *United States and Plaintiff States v. Comcast Corp., et al.*, (D.D.C. 2011) (No. 1:11-cv-00106) (filed Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

³⁰ *Id.* at 30-40.

The Federal Communications Commission (FCC) also had jurisdiction to review the NBCU/Comcast proposed joint venture, and we closely coordinated with them throughout our investigation. Through this coordination (which included a joint review of documents), we, at DOJ, were able to drive a faster timeline than otherwise would have occurred at the FCC and we kept results consistent across the agencies. This is just one example of how the Division seeks to be a good steward of government resources through coordinated efficient and effective enforcement that achieves the right result.

The Division was presented with another important vertical case when Google sought to acquire ITA Software Inc., a company that develops and licenses a search software product used by the travel industry to perform flight searches and offer airfare comparison and booking websites.³¹ Google also had plans to offer its own online travel search product that would compete with those in the travel industry that rely on the ITA product.³²

Preserving competition in the flight search industry is important. Innovation in flight service tools provides travelers with quick and convenient access to the most prices and useful itineraries, and absent a remedy, the Google/ITA transaction would have reduced that innovation. The consent decree resolves those concerns in a variety of ways. It requires Google to continue to develop and license the ITA travel software, establish strict internal firewall procedures, continue software research and development, and offer mandatory arbitration and a formal reporting mechanism for complainants.³³

³¹ Competitive Impact Statement, *United States v. Google Inc. et al.* (D.D.C. 2011) (No. 1-11-cv-00688) (filed Apr. 8, 2011), *available at* <http://www.justice.gov/atr/cases/f269600/269620.pdf>.

³² *Id.* at 2.

³³ *Id.* at 9-15.

The third major Division enforcement action involving a vertical theory was the merger of Live Nation and Ticketmaster. Ticketmaster was dominant in primary ticketing for major concerts and faced a competitive threat when Live Nation sought to use its standing as a major promoter and venue owner to sponsor entry by a new ticketing system.³⁴ In so doing, Live Nation sought not only to service its own venues and clients, but also to lure business away from Ticketmaster.³⁵ The Ticketmaster/Live Nation merger thus represented both a horizontal combination (between the largest primary ticketing service and the first major entrant) and a merger between two large players at different stages in the supply chain.

The Division resolved these competitive harms through a consent decree that imposes structural and conduct remedies. The settlement requires Ticketmaster to divest ticketing assets, license its ticketing software to its competitor AEG, and comply with 10-year, anti-retaliation provisions that prohibit anticompetitive bundling.³⁶ Together, these provisions preserve competition in primary ticketing and maintain incentives in the industry to innovate and discount—a scenario that according to numerous public accounts is occurring in the industry today with new competition in the industry and declining summer concert ticket prices.³⁷ Indeed, the *New York Times* pointed to our

³⁴ Competitive Impact Statement, *United States and Plaintiff States v. Ticketmaster Entertainment Inc. et al.* at 8-10. (D.D.C. 2010) (No. 1:10-cv-00139) (filed Jan. 25, 2010), *available at* <http://www.justice.gov/atr/cases/f254500/254544.htm>.

³⁵ *Id.*

³⁶ *Id.* at 13-18.

³⁷ *See, e.g.,* Alex Pham and Randy Lewis, “Concerts cut ticket prices and add star power”, THE LOS ANGELES TIMES (May 2, 2011), *available at* <http://articles.latimes.com/2011/may/02/business/la-fi-ct-concerts-20110503> (last visited June 16, 2011); Alex Pham, “Ticketmaster to roll out ‘dynamic pricing’”, THE LOS ANGELES TIMES (Apr. 19, 2011), *available at* <http://articles.latimes.com/2011/apr/19/business/la-fi-ct-live-nation-20110419> (last visited June 16, 2011).

consent agreement as one of the reasons for this—through the consent decree, we ensured competition could flourish.³⁸

There are some who would prefer that the Division block rather than resolve anticompetitive effects through a conduct remedy. Others, not surprisingly, urge the Division to simply let transactions proceed without restriction. Fortunately, the antitrust laws do not require a binary choice. In this environment of global mergers and complex vertical transactions, the Antitrust Division has been nimble in its efforts and adopted effective remedies that preserve competition and promote innovation. We have focused on identifying remedies that work, whether that means blocking a transaction outright or settling on terms that specifically eliminate any competitive harm.

The Division's approach also is reflected in its recently updated Remedies Guide, which I highlighted at the outset of my remarks.³⁹ The policy guide is a tool for Antitrust Division staff to use in analyzing proposed remedies in its merger matters, but it also is made available on our website as part of our continued commitment to provide transparency for the business community, the antitrust bar, and the broader public.

Effective and efficient merger review is supported by coordination, where appropriate and with parties' consent, with our international counterparts. The importance of this collaboration cannot be understated, as it allows multiple jurisdictions reviewing a transaction to know, understand, respect, and manage the similarities and

³⁸ See, e.g., Janet Morrissey, "Can Ticketmaster's Builder Now Unseat It?," NEW YORK TIMES (June 11, 2011) (available at http://www.nytimes.com/2011/06/12/business/12tickets.html?_r=1&adxnnl=1&pagewanted=3&adxnnlx=1308164442-HKyld/9jGh7xPPG/s5Mp0Q (last visited June 15, 2011)) ("When the Justice Department approved the Live Nation merger, it stipulated that AEG would be allowed to use Ticketmaster's technology for five years, at which point it must switch to an independent platform. This was intended to ensure that competition remained in the ticketing industry.).

³⁹ See *supra*, note 2.

differences among us.⁴⁰ To be successful, this collaboration requires that we remain mindful that one jurisdiction's remedy may influence unnecessarily competition in other jurisdictions.

The Division has adopted this mindfulness and has coordinated extensively with non-U.S. jurisdictions. In FY 2010, the Division worked on almost 40 civil investigations with an international dimension, most of which involved some level of coordination or cooperation. Four recent civil merger matters in which we collaborated with our international counterparts are Ticketmaster-Live Nation, where we worked with Canada's Competition Bureau;⁴¹ Cisco-Tandberg, where we coordinated with the European Commission;⁴² CPTN-Novell, where we coordinated with the German Federal Cartel Office;⁴³ and Alberto Culver-Unilever, where we coordinated with Mexico's Federal Competition Commission, the Office of Fair Trading in the United Kingdom, and South Africa's Competition Commission.⁴⁴ In all of these cases, the parties and the agencies benefited from the collaborative approach. The parties had the benefit of an

⁴⁰ See, e.g., Christine Varney, *International Cooperation: Preparing for the Future*, (Sept 21, 2011), available at: <http://www.justice.gov/atr/public/speeches/262606.htm>.

⁴¹ See U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.*, (Jan. 25, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254540.htm.

⁴² See U.S. Dep't of Justice, *Justice Department Will Not Challenge Cisco's Acquisition of Tandberg* (March 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

⁴³ See U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns* (Apr. 20, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270086.htm

⁴⁴ See U.S. Dep't of Justice, *Justice Department Requires Divestitures in Unilever's Acquisition of Alberto-Culver Company* (May 6, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270854.htm

expeditious review and the agencies, while remaining mindful of every jurisdiction's markets and market solutions, benefited from shared learning and expertise.

This also squares with the Department of Justice's commitment to advocating for procedural fairness in the United States and around the world.⁴⁵ The certainty and understanding that business needs to react appropriately and effectively can only be achieved if businesses are provided with a clear understanding of the competition rules that apply to them.⁴⁶

The Division's international efforts have been supported by the Division's bilateral and multilateral relationships, and the Division continues to look for new opportunities in this regard. We particularly focused on working with emerging economies. In November 2009, we signed a Memorandum of Understanding (MOU) with the Russian competition authority. We, along with the FTC, also look forward to officially signing an MOU with all three competition agencies in China later this summer. This MOU outlines five (two U.S. and three Chinese) agencies' commitment to coordinate and work together when we can. We are also pursuing such an agreement with India as it builds its antitrust regime.

These are important achievements. MOUs provide a sound basis for enhanced cooperation on a day-to-day basis, while minimizing possible conflicts between the signatory's antitrust enforcement activities. However, our work does not end with a signing ceremony. One concern is that emerging economies will use competition laws as

⁴⁵ See, e.g., Christine A. Varney, *Procedural Fairness* (Sept. 12, 2009) ("us[ing]this opportunity to call on competition agencies, international organizations, and the antitrust community to discuss procedural fairness more broadly, focusing on the opportunity to refine procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts"), available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

⁴⁶ *Id.*

a method to promote their trade interests—an MOU among competition agencies will not cure this problem, but it is a first step.

III. Civil Non-Merger Enforcement

The Division also remains active in civil non-merger enforcement, including two matters in ongoing litigation—the Division’s lawsuit challenging Blue Cross Blue Shield of Michigan’s anticompetitive Most Favored Nation Clauses⁴⁷ and the Division’s challenge to merchant fees in its lawsuit against American Express.⁴⁸

Also this year, the Division brought its first case since 1999 that challenges a monopolist with engaging in traditional anticompetitive unilateral conduct.⁴⁹ In that case, we challenged exclusive dealing contracts used by United Regional Health Care System—a dominant health care provider—to maintain its monopoly for hospital services in violation of Section 2 of the Sherman Act.⁵⁰

One issue that arises in the context of civil non-merger enforcement, and which I understand is of considerable interest to the business community, is the application of the antitrust laws to standard setting. I have examined standard setting since my days as a Federal Trade Commissioner, when I voted to challenge Dell Computer Corporation’s

⁴⁷ Complaint, *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, (D. Mich. 2010) (No. 2:10-cv-15155-DPH-MKM) (filed Oct. 10, 2010), available at <http://www.justice.gov/atr/cases/f263200/263235.htm>.

⁴⁸ Complaint, *United States and Plaintiff States v. American Express Company, et al.*, (S.D.N.Y. 2010) (No. 1:10-cv-04496) (filed Oct. 4, 2010), available at <http://www.justice.gov/atr/cases/f262800/262864.htm>.

⁴⁹ See Complaint, *United States and State of Texas v. United Regional Health Care System* (D. Tex. 2011) (filed Feb. 25, 2011), available at <http://www.justice.gov/atr/cases/f267600/267651.pdf>.

⁵⁰ *Id.* See also U.S. Dep’t of Justice, *Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers* (Feb. 25, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/267648.htm.

anticompetitive conduct in a Standard Setting Organization (SSO).⁵¹ The FTC alleged that Dell—as a member of an SSO—restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise undisclosed patent rights against computer companies that had adopted the standard.⁵² In that settlement, the FTC made clear that the antitrust laws do not allow firms to commit to an open standard, and only after the standard is adopted, assert patent rights to block use of the design or increase prices.⁵³

However, if structured appropriately, standards promulgated by an SSO can be permissible under the antitrust laws. As you well know, standard setting creates enormous benefits for businesses and consumers, including reducing production costs and fostering public health and safety. The Division has expressed this support for SSOs in a joint report with the FTC, in business review letters, and in speeches.⁵⁴

I personally support the role of standard setting in promoting innovation as long as such standards comply with the basic and fundamental principles of the antitrust laws. This requires that standards be open and published, with clear disclosure and license rules, and should be apportioned fairly and efficiently, with no company able to distort the process. In addition, standards should be limited to technical and operational

⁵¹ *In re Dell*, 121 F.T.C. 616 (1996). *available at* [http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_\(JANUARY_-_JUNE_1996\)PAGES_561-655.pdf#page=56](http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_561-655.pdf#page=56).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *Promoting Innovation Through Patent and Antitrust Law and Policy* at n. 22 (May 26, 2010), *available at* <http://www.justice.gov/atr/public/speeches/260101.htm#22>.

functions that support individual business decisions—not thwart the competitive process by enabling collective and collusive business decisions. The best SSO framework may vary by industry, but these fundamental principles remain.

IV. Competition Advocacy

The Division also remains actively involved in its competition advocacy and regulatory outreach across the government, through which we seek to strengthen markets and preserve economic freedom and fairness. The Division actively works with a broad range of federal and state agencies to promote competition principles in vitally important industries in our economy, including agriculture, telecommunications, energy, financial services, and healthcare.

Among my competition advocacy priorities when I arrived at the Division was to explore the appropriate role for antitrust and regulatory enforcement in American agriculture, and this required collaboration at many levels. The Department and the USDA joined together to host a series of workshops around the country to discuss competition and regulatory issues faced by the agriculture industry where we listened and learned from a diverse group of stakeholders from all levels of the production chain about competition and regulatory issues in the agriculture industry.

Our work on agriculture issues continues, but as we learned through our workshops, many significant problems faced in this sector cannot be resolved through competition policy and antitrust enforcement. Nonetheless, we continue to look for solutions.

In addition, we have worked collaboratively with, and provided input on competition issues to, the Department of Transportation, the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), and the U.S. Commodity Futures Trading Commission (CFTC), to name a few. For example, over the past year, the Division filed comments in a CFTC rulemaking regarding credit derivatives and with the Surface Transportation Board (STB) on competition issues affecting the railroad industry.⁵⁵

We also work collaboratively with our agency counterparts on enforcement matters. For example, we have coordinated with FERC on energy mergers and, as I noted already, with the FCC on enforcement matters, such as NBCU/Comcast, where we share jurisdiction.

The Division also has demonstrated its versatility in working with other federal and state agencies in criminal enforcement matters. In our ongoing municipal bonds investigation, the Division played a key role in obtaining an agreement from Bank of America (BOA) to pay a total of \$137.3 million in restitution and disgorgement to state and federal agencies for BOA's participation in a conspiracy to rig bids in the municipal bond derivatives market and as a condition of its admission into the Department of Justice's Antitrust Corporate Leniency Program. As a part of this global resolution, BOA entered into agreements with the SEC, Internal Revenue Service, Office of the Comptroller of the Currency, and 20 State Attorneys General, and also agreed with the

⁵⁵ Dep't of Justice, *Comments on Proposed Rules Limiting Ownership and Regulating Governance for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities* (Dec. 28, 2010), available at <http://www.justice.gov/atr/public/comments/265618.htm>.

Federal Reserve Board to address certain remedial measures.⁵⁶ Most recently the Division's municipal bonds investigation resulted in an agreement by UBS AG to pay a total of \$160 million in restitution, penalties, and disgorgement to federal and state agencies.⁵⁷

The municipal bonds investigation also is an example of the Division's active criminal enforcement, which remains a consistent priority. The Division has focused on prosecution of large price-fixing, bid-rigging, and market allocation cartels that raise prices to both businesses and individual consumers, restrict supply, reduce innovation, and act as a drag on the entire economy. Our criminal investigations and cases have examined a variety of industries important to American businesses and consumers, including the financial services sector, air transportation services, freight forwarding, liquid crystal display panels, and autoparts suppliers. In the last fiscal year, the Division brought 60 cases on the criminal side, charging 84 defendants. In that year, the Division obtained over \$550 million in fines, more than \$24 million in restitution, and prison sentences totaling over 71 years.

⁵⁶ Dep't of Justice, *Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of The Justice Department's Antitrust Corporate Leniency Program*" (Dec. 7, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/264827.htm.

⁵⁷ U.S. Dep't of Justice, *UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies* (May 14, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/270720.htm.

V. Conclusion

As I stated at the outset, transparency is among my highest priorities. Another is hearing from you and others in the business community about the competition issues you see in your industries, where the bottlenecks to competition are found, and where your industries are headed. I look forward to your questions and comments today on these and other issues.